IN THE

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT

NO. 5545 OCTOBER TERM, 1934.

NANCY K. McFEELY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR RE-HEARING.

H. B. WASSELL,
Attorney for Petitioner.

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Pittsburgh, Pa.

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To the Honorable, the Justices of said Court:

Nancy K. McFeely, the petitioner, by H. B. Wassell, Counsel, hereby petitions this Honorable Court for a re-hearing of the above entitled cause and respectfully represents:

(1) Your Honorable Court on December 10, 1934, held:

> "This case depends on its own particular facts and as no precedent or principle is involved and we find ourselves in accord with the action of the Tax Board, we limit ourselves to affirmance of its order."

(2) Counsel for Petitioner, in emphasizing in his oral argument the question of constructive dis-

tribution, raised under the fifth assignment of error, has evidently misled the Court into the conclusion that no precedent or principle was involved.

(3) This case did establish a precedent or principle which was afterwards followed by the Tax Board in other cases. There are appeals now pending in these cases before the Circuit Court of Appeals in four other circuits in addition to this appeal.

(4) The Board of Tax Appeals in this case decided for the first time and as a precedent that the two year period for the purpose of capital gain provisions commences on the date when the property of an estate is distributed and not on the date of its acquisition at decedent's death as decided in *Brewster v. Gage,* 280 U. S. 327.

(5) This principle or precedent was handed down in this case at bar on February 2, 1934, and was followed in the case of *Isabel K. Dibblee v. Helvering,* 29 B. T. A. 1070, on February 13, 1934, Lansdon, J. dissenting, which case is now on appeal in the Ninth Circuit.

(6) The Board of Tax Appeals on February 20, 1934, in a Memorandum Opinion in the case of *Frances G. Lee v. Helvering,* Docket No. 65705, says:

> "The question here presented for our determination is controlled by the Board's decisions in Nancy K. McFeely, 29 B. T. A. 998, promulgated February 2, 1934, and Isabel K. Dibblee, 29 B. T. A. 1070, promulgated February 13, 1934. We held in those cases that the date

of distribution of securities to the legatee or devisee determines the beginning of the period for which they shall be deemed to have been held by such distributee for the purpose of determining the applicability of Section 101 of the Revenue Act of 1928. Upon authority of those cases we hold the securities in question were not held by the petitioner for more than two years within the meaning of Section 101 (c) (8), and that the petitioner is not entitled to report the profits from the sale of the securities in question as capital net gain."

This case is now on appeal to the First Circuit.

(7) The Board of Tax Appeals in Memo. opinion took the same action in the following cases:

Elizabeth R. Stone v. Helvering, now on appeal in the Second Circuit.

Rufus R. Rand, Jr. v. Helvering, now on appeal in the Eighth Circuit.

Kate A. Ogle v. Helvering, now on appeal in the Second Circuit.

(8) The case at bar and the others above cited involve the construction of Section 113, as amended by the Act of 1928, and Section 101, which was not changed, to determine the holding period of "Capital assets," and further involve the question of whether Congress can define property rights contrary to the rules of property existing in the several states.

(9) The principles involved are covered by the Petitioner's assignments of error 1 to 4 and 6,

and were not covered in the oral argument as your Honorable Court seemed to consider the question of constructive distribution of greater importance.

Wherefore in view of the fact that this case is a ruling case establishing a precedent under which appeals are pending in four other Circuit Courts of Appeal, and in consideration of the fact that the principles involved were not fully and adequately presented in the oral argument, Counsel for Petitioner respectfully petitions your Honorable Court to grant a re-hearing, and he will ever pray.

H. B. WASSELL,
Attorney for Petitioner.

3106 Grant Building,
Pittsburgh, Penna.

Certificate.

State of Pennsylvania,
County of Allegheny, } ss.:

H. B. Wassell, being first duly sworn, certifies that he is counsel of record in the above-named cause; that as such he is authorized to verify the foregoing Petition for re-hearing; that he has read the said petition and is familiar with the statements contained therein; and that the statements made are true to the best of his knowledge, information and belief, and that this petition is not filed for the purpose of delay.

H. B. WASSELL.

Sworn to and subscribed before me this 3rd day of January, 1935.

LEO J. AARON,
Notary Public.

[SEAL]

My commission expires March 2, 1937.

[fol. 60] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1934

No. 5545

NANCY K. McFEELY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Sur Petition for Rehearing

And now, to wit, January 18, 1935, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia, January 18, 1935.

Per CURIAM:

Buffington, Circuit Judge.

Endorsements: Order Denying Petition for Rehearing. Rec'd & Filed Jan. 18, 1935. Wm. P. Rowland, Clerk.

[fol. 61] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, Third Judicial Circuit, sct:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this Court in the case of Nancy K. McFeely, Petitioner, vs. Commissioner of Internal Revenue, Respondent, No. 5545, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 26th day of March, in the year of our Lord one thousand nine hundred and thirty-five and of the Independence of the United States the one hundred and fifty-ninth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal United States Circuit Court of Appeals, Third Circuit.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 20, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.